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IN THE

Supreme Court of the United States

October Term, 1968

No. 45

UNITED STATES OF AMERICA,
Petitioner,

v.

RICHARD G. AUGENBLICK,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Claims

BRIEF FOR THE RESPONDENT, RICHARD G. AUGENBLICK, IN OPPOSITION

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April 16, 1968

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1212

UNITED STATES OF AMERICA,
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v.

RICHARD G. AUGENBLICK,
Respondent.

On Petition for a Writ of Certiorari
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BRIEF FOR THE RESPONDENT, RICHARD G. AUGENBLICK, IN OPPOSITION

INTRODUCTION

In *Augenblick*, the Government proposes to eliminate all remedies before civilian courts (including the Supreme Court) for servicemen whose constitutional rights have been violated by courts martial and whose punishment chances to be cashiering, rather than jail.

This Court has always recognized that servicemen are entitled to the protection of basic guarantees of due process in

criminal prosecutions. So held this Court unequivocally in *Burns v. Wilson*, 346 U.S. 137 (1953).[1]

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." 346 U.S. at 142-3.

The Government's Petition for Certiorari in the *Augenblick* case raises for the first time before this Court the proposition that constitutional guarantees of due process cannot be enforced in *any* civilian court, including the Supreme Court of the United States, by an entire class of servicemen whose loss of all constitutional remedy turns solely on the accident of punishment meted out to them.[2]

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[1] The availability of meaningful civil protection under the Due Process clause of the Constitution was explicit in all five opinions in the *Burns* case. As Chief Justice Warren has subsequently summarized the common theme of the *Burns* opinions:

> ". . . I believe they do constitute recognition of the proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, C. J., *The Bill of Rights and the Military* (the James Madison Lecture before the New York University Law Center, February 1, 1962), 37 N.Y.U.L. Rev. 181 at 188 (1962).

[2] This case was joined with another in the Petition for the sole reason that both arose from military prosecutions followed by proceedings in the Court of Claims. Since the Court of Claims limited its holding to the facts in *Augenblick*, and since the limited jurisdiction of that Court turns on the existence *vel non* of constitutional injury in the particular case before it, all representations in this Brief in Opposition deal exclusively with the *Augenblick* decision. Whatever questions might arise in other cases, the jurisdiction of both the Court of Claims and this Court with regard to *Augenblick* is clear from the long history of judicial action, unimpaired by any legislative enactment, as is shown *supra*, Args. II-IV.

OPINIONS BELOW

The opinion of the Court of Claims (Petition, App. A. 1-37) is reported at 377 F.2d 586. The opinions of the Department of the Navy Board of Review (App. B. 38-86) are unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did Congress, in enacting Article 76 of the Uniform Code of Military Justice (10 U.S.C. Sec. 876, 1950) intend to deprive servicemen convicted by court martial in violation of constitutional due process, of all remedies before civilian courts, including the Court of Claims and the Supreme Court, solely because they were cashiered rather than jailed?

STATUTES INVOLVED

The Petition adequately sets forth (Pet. 2-3) in pertinent part the provisions of Article 76 of the U.C.M.J., 10 U.S.C. Sec. 876 (1950). However, the Petition fails to set forth, pursuant to Rule 23 (1) (d) of the Rules of this Court, and selectively omits section (c) of the Jencks Act, 18 U.S.C. Sec. 3500 (c) (1957). Said section (c) is as follows:

> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If,

> pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

The statutory basis for jurisdiction of the Court of Claims, 28 U.S.C. 1491 (1954), is, in pertinent part, as follows:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

Article of War 50h, Act of June 24, 1948 (Elston Act) c. 625, Sec. 226, 62 Stat. 635, the predecessor of Article 76 of the U.C.M.J., provided as follows:

> FINALITY OF COURT-MARTIAL JUDGMENTS.– The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 and 49, the proceedings, finding, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War,

shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in Article 53.

COUNTERSTATEMENT OF THE CASE

The Government is reticent with the full facts of *Augenblick*.

Commander Augenblick had served the Navy with distinction for 18 years until the night of January 11-12, 1961, the date of the alleged offense. His duty had included combat and command experience, schooling at the Naval War College, service in the Office of the Secretary of Defense and the Strategic Plans Division of the Office of Naval Operations. His record was without blemish, and he had been selected for promotion to a captaincy.[3]

On the night of January 11-12, 1961, events took place which terminated Commander Augenblick's career. They resulted in an accusation by the Navy of a violation of Article 125 of the Uniform Code of Military Justice, 10 U.S.C. Sec. 925 (1950), specifying that he had committed sodomy with an Airman, one Hodges. Commander Augenblick has denied these charges throughout, and, indeed, he was acquitted of them by his court martial. But under the circumstances described hereinbelow he was convicted of a lesser, but no less heinous charge, cashiered with loss of all rank, pay and privileges and forced to leave the Navy, his career.

The following facts leap forward from the story of the night of the alleged crime.[4]

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[3] Petition in the Court of Claims, P. 1, Para. 1; Answer, P. 1, Para. 1.

[4] These facts go solely to the issue of whether Commander Augenblick's constitutional rights were invaded. It is submitted that the Government's recital of facts retries Commander Augenblick's guilt or

(Footnote 4 continued on page 6)

Within two hours after the arrest by civilian police of Airman Hodges and Commander Augenblick (I-17, 18, 19, VI-57),[5] both men were turned over to civilian Naval Intelligence investigators for questioning at the Intelligence Office of the Potomac River Command in a building at the Naval Weapons Plant. They were questioned in turn (V-47-48). One of these investigators, Agent Mendelson, admitted during a pre-trial hearing[6]

(Footnote 4 continued from page 6)

innocence, an issue which is leagues apart from the one before this Court. Moeover, those guilt-or-innocence questions which the Government seeks to inject are consummately misleading: e.g.,

> "However, the two arresting police officers gave testimony fully supporting the finding of the lesser offense for which Augenblick was convicted." (Pet. 6)

But see what this evidence really was: (Judge Davis' opinion below, App. A. 34, where the consistency of the police officers' testimony with Commander Augenblick's defense is noted.) The place to retry Commander Augenblick is before a court martial, not before this Court.

[5] Citations by numeral are to the record of the Navy proceedings, certified and filed with this Court. The Roman numeral indicates the volume of the record, the Arabic numeral the pagination within the volume.

[6] Agent Mendelson's pervasive lack of candor at pre-trial was sufficiently striking to draw sharp comment from the Court of Claims. "It was evident, we stress, from his earlier testimony that Mendelson was not a witness whose prior statements could be accepted at face value." (App. A. 27). Moreover, it was another Mendelson irregularity which resulted in the need for convening *two* courts martial by the Navy. At the initial pre-trial investigation, Mendelson testified that he had taken a sworn statement from one of the civilian arresting officers, which assertion was a prime basis for the convening of the first court. During the first trial, this same civilian officer made it quite clear that Mendelson had taken no sworn statement at all. The Law Officer then terminated the trial as defectively originated, returned the case to the convening authority who, in turn, convened a Court of Inquiry. Then a second court martial was ordered to try Commander Augenblick anew.

(he was never permitted to testify at either of the Commander's two trials) that he had taken notes during his questioning of Hodges.[7] For eleven pages of testimony Agent Mendelson denied any knowledge of the existence of a tape recording of the Hodges interview or of ever having received such a tape (V-52-63). Agent Mendelson admitted, however, that another civilian agent, Agent James, was the agent who routinely made these tapes, and that Agent James "might" have been present that night in an adjoining room where the actual recording would have taken place. (V-58). Mendelson then specifically denied having received any tape of the Hodges interview (V-61). Agent James, however, had no doubts. He freely admitted being in the Interrogation area early in the morning of the 12th of January (V-69), meeting and discussing the case with Mendelson (V-69, 70) and taping the Hodges interview (V-71, 72).

The course of Mendelson's notes and the tape recording of the Hodges interview are both significant. At both of Commander Augenblick's trials, Hodges was the chief Government witness and did, in fact, testify. Accordingly, defense counsel in the second trial[8] moved for discovery of the notes, pursuant

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[7] "I do recall that the information that was given at this interview was later more or less typed up in — you might say a memo-report for my own information just setting down such things as what time I was called, what time I arrived there, and what Hodges said." (V-51). In his later description of these notes, the Government prosecuting counsel was more precise "... And mostly he [Mendelson] tells me it has to do with what he did that day – that is to say, I went to the Gun Factory and so on, but it does, he tells me, summarize, or at least refer to the language that Hodges used or some that he said. I'll get on the witness stand and testify to that if you desire, but I – that is what I'm told the situation is." (VI-76, 77).

[8] The first trial was terminated (because of the additional Mendelson irregularity noted above, footnote 6) before the Law Officer could face the Jencks Act issue.

to the specific mandate of the Jencks Act, 18 U.S.C., Secs. 3500(a) and (e) (1957). Notwithstanding Mendelson's description that these notes contained "what Hodges said", and Government counsel's admission that they contained "language that Hodges used", the Law Officer, without conducting any examination of the notes (*in camera* or otherwise), denied this request. (VI-78).[9]

The trail of the tape is more tortuous. After Hodges had testified at the second court martial, the Law Officer convened an out-of-court hearing before himself alone to determine the bearing of the Jencks Act with regard to the tape. Agent James testified that after consultation with Mendelson, he, Agent James, went to the "Sound Room" and taped the Hodges interview. (VI-90). It lasted 25 minutes. (VI-90). James also taped an interrogation of Commander Augenblick that followed immediately after the Hodges questioning. James then went to Mendelson's office at the Navy Center in Arlington to turn the tapes over to Mendelson, but Mendelson was not there. James there-

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[9] Again the Government dissembles: "Quoting the Agent's testimony at the pre-trial hearing, the Board concluded that the notes had been offered to the defense at that time but the defense exhibited no interest in having them produced." (Pet. 9). The facts are that Mendelson, at the pre-trial inquiry (III -116) indicated that he did have notes, but not with him. *Subsequent to the hearing, Commander Werner Windus, appointed Defense Counsel for Commander Augenblick, specifically requested these notes from Mendelson.* Mendelson informed Commander Windus that he could not locate the notes. (See Affidavit of Commander Werner Windus, filed in the Court of Claims as an attachment to Commander Augenblick's Reply Brief, and set forth as Appendix A to this Brief). The nonsense that "the defense exhibited no interest" in these notes was specifically dispelled by the finding of the Court of Claims: "In addition, the Board of Review rested in part on its factually erroneous statement (twice repeated) that accused's counsel did not ask for the notes at the pre-trial proceedings." (App. A. 31). The Government must be brought back to the facts again, even in pleadings before the Supreme Court.

after turned the tapes over to Agent Fason, Mendelson's superior, for retransmittal to Mendelson. (VI-94). Agent Fason brought the matter full circle by testifying specifically that he had turned the tape over to Mendelson (VI-115), notwithstanding Mendelson's persistent unwillingness to admit that he ever possessed the tape, (V-61, 63). James testified he had searched all of the areas at the Naval Weapons Plant where the tape might be, but had been unable to find it (VI-95), although the tape of Commander Augenblick's questioning was curiously available. (VI-100). Another witness testified that the headquarters of the ONI at the Navy Center at Arlington had also been searched and the Hodges tape had not been found. (VI-109-110). After additional out-of-court testimony, all that could be gleaned was that Mendelson once had the Hodges tape, but now it was gone.

The defense then asked that Mendelson be called from Norfolk where he was then located, to testify against the foregoing background as to the whereabouts of the Hodges tape. Mendelson had testified at pre-trial, it will be noted, that in all likelihood a tape of the Hodges questioning had not been made. (V-52), that he had no recollection of a Hodges tape (although James who took the tape testified that he had consulted with Mendelson prior to taking it) and that he had never received a tape of Hodges' questioning (although his own superior – Fason – testified he turned it over to Mendelson). Against a showing that the trail of the tape had ended inexplicably with Mendelson, the Law Officer then made what can only be termed an incredible error of law in ruling as follows:

> "But in view of everything that I have heard, at this time I will not grant the Government [sic] to produce Mr. Mendelson from Norfolk." (VI-138).

To which the Defense immediately took exception. The Defense then, under the Jencks Act, 18 U.S.C. 3500(d) (1957) moved to strike the vital Hodges testimony, integral to the government's case. This Motion was also denied. (VI-147).

The Court Martial then went forward and found Commander Augenblick not guilty of the charge and specification under

Article 125 of the UCMJ, 10 U.S.C. Sec. 925 (1950), but – with the witness Hodges' testimony still in the record, and unimpeached – guilty of a violation of Article 134 of the UCMJ, 10 U.S.C. 934 (1950) – of committing a "lewd and lascivious act".

The following is what happened to Commander Augenblick: On September 13, 1961, the Court sentenced him to be dismissed from service. The sentence was approved by the convening authority and, by a 2-to-1 vote, on September 20, 1962, by the U.S. Navy Board of Review. On the key point of who carried the burden of explaining the curious disappearance of the Hodges tape, the majority of the Board of Review stated:

> "*It was the responsibility of counsel for Defendants* [sic] *to pursue ascertainment of correctness* of the Government's claim that the tape recording which was demanded for production is no longer in existence, and for no reprehensible reason chargeable to the Government." (Emphasis supplied.) (App. B. 62-3)

The dissent entirely disagreed with this position and held that the proceeding had been fatally marred by Jencks Act violations. A Petition for Grant of Review by the Court of Military Appeals was denied on January 11, 1963, without opinion. Reconsideration was denied by that Court on January 29, 1963, also without opinion. The Secretary of the Navy declined review under Article 71 of the UCMJ, 10 U.S.C. 871 (1950), on January 11, 1963. Petitioner was dismissed with total forfeitures as of February 5, 1963, and has not been reinstated since. On November 14, 1964, the Board for Correction of Records denied Petitioner's application for correction of his records.

But this is what happened to Airman Hodges: The morning after the alleged offense, he was confronted by his Commanding Officer. (VI-152). Three weeks later Hodges was

notified by the same officer that he, Hodges, was being recommended for an honorable discharge, (VI-153), after only 12½ months of a four-year enlistment (VI-103). But the Air Force would not actually give this discharge to him until after the Augenblick trial. On September 8, seven months later, Hodges was still in service, still under promise of an honorable discharge, testifying as the principal witness against Commander Augenblick (VI-153). It was not until after the trial, and only then, that Hodges was given his honorable discharge. (App. A. 34)[10]

That is the factual background of the Jencks Act issue in this case as it confronted the Court of Claims.

On October 22, 1964, Commander Augenblick's Petition was filed in the Court of Claims. That Court rendered its unanimous judgment in his favor on May 12, 1967. Judge Davis, writing for the Court, stated at the outset that the Court had not embarked on a re-evaluation of the evidence before the Court-Martial, nor had it weighed issues of fact. Rather, he ruled:

> "The errors we find mount to a constitutional defect which grows directly from, and is entwined with, erroneous legal rulings by the law officer and the Board of Review." (App. A. 9)

These errors, as outlined by the Court, ranged the full breadth of the Jencks Act. First, the Court found that the Board of Review improperly placed the burden on Commander Augenblick of proving the Government's bad faith in non-production of the Hodges tape (App. A. 22-3). Next the Court found that the failure of the Law Officer to call Mendelson for testimony "substantially prejudiced" Commander Augenblick's rights (App. A. 28). Finally, the Court found that the

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[10] It was stipulated between counsel for Commander Augenblick and the Government in the proceeding before the Court of Claims that Hodges was honorably discharged from the Air Force between September 13 and 18, 1961. Commander Augenblick's Court Martial ended September 13, 1961.

Law Officer erred in refusing to conduct an *in camera* examination of Mendelson's notes before denying discovery of them to the defense (App. A. 31). The Court carefully limited the scope of its ruling by declaring its view that –

> "Every violation of the protections afforded by the Jencks Act does not, in and of itself, amount ipso facto to a violation of the Due Process Clause." (App. A. 32)

The Court then looked to the circumstances of the particular case before it to determine whether these violations rose to the level of Constitutional injury. It found that they had –

> "A combination of factors leads us to conclude that in this case the Jencks Act violations were so weighty that they cumulated to the denial of a minimally fair trial." (App. A. 33)

These factors were: that Hodges was an all-important prosecution witness, whose veracity prudently should have been tested by the materials kept from the defense; that he was young and obviously frightened; and that he openly had been offered an honorable discharge whose execution had been delayed until the end of the Augenblick trial. The Court properly felt it

> "very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation." (App. A. 34)

Moreover, the Court felt that Hodges' testimony was pivotal to *any* conviction whatsoever of Commander Augenblick, even of a lesser included offense than the one with which he was charged, since all the other testimony available (including that of the arresting officers) was not necessarily inconsistent with the Commander's defense that he had fallen asleep. (App. A. 34) In so ruling the Court bore well in mind the nature of the sex offense charge, which heinous as it is, is "not difficult to utter but arduous to defend." (App. A. 35) In a situation where the accused had never before been so accused, where

such charges often fall easy prey to unreliable, unbalanced accusers, and where they depend on direct and explicit accusations of the accuser, the Court felt that the materials drawn from an interrogation immediately after the alleged occurrence "would have been especially important to the defense in the court-martial." (App. A. 35) Lacking any other means of obtaining these materials in this case, the Defendant was faced not simply with a procedural lapse on the part of the Government. The very essentials of his defense, the Court of Claims found, had been denied him –

> "In the absence of satisfactory alternative means of discovery, the legal errors committed by the law officer and the Board of Review deprived the accused of rights which were extremely valuable to him – of cardinal moment in this case. He was denied a necessary step toward obtaining, or discovering the status of, materials of first rank for his defense. In our view, this denial, in the circumstances, seriously impeded his right to a fair trial in violation of the Due Process Clause of the Constitution. (App. A. 36-7)

Limiting its holding to the facts before it, the Court then invoked the time-honored jurisdiction given it to correct constitutional abuse in military trials. It ruled that Commander Augenblick was entitled to back pay and allowances from the date of his dismissal.

SUMMARY OF ARGUMENT

The Government now proposes to oust the jurisdiction of this Court as protector of the constitutional rights of individuals for the class of servicemen whose rights have been violated in the imposition of punishment other than imprisonment. In *Augenblick*, the Court of Claims, an Article III Court under the Constitution, provided review of constitutional error and an avenue to review by this Court, which limited jurisdiction the Government now proposes to abolish. (Arg. I)

The jurisdiction of the Court of Claims to review constitutional deprivations of servicemen has been long established and validated repeatedly by this Court (Arg. II).

That jurisdiction to protect constitutional rights could have been abolished only by the clearest expression of legislative intent. However, the legislative history of Article 76 of the UCMJ, which provides for "finality", and of the predecessor Article 50h of the 1948 amended version of the Articles of War, conclusively establishes that such excision was not the intention of Congress (Arg. IIIA). Moreover, had Congress so intended, the gravest constitutional question would arise regarding the constitutionality of those provisions (Arg. IIIB).

Contemporaneous and subsequent treatment by the Congress of the jurisdiction of the Court of Claims reinforces the foregoing conclusion, in that jurisdiction to review constitutionally-based claims has remained undiminished (Arg. IV A). Moreover, a long line of cases in the Court of Claims and the Courts of Appeals, buttressed by clear holdings of this Court, in the years since the enactment of the UCMJ has confirmed the instant jurisdiction of the Court of Claims. (Arg. IVB)

In reviewing *Augenblick*, the Court of Claims exercised its traditional jurisdiction to review the handling of servicemen's constitutional rights and did so with restraint. In reviewing the violations here asserted of the Jencks Act the Court properly determined that in the case before it constitutional due process had been denied.

There is no need for or useful purpose to be served by taking certiorari in this case and so casting in doubt the long-established, untouched and salutary constitutional remedy of review in the Court of Claims. (Arg. VI).

ARGUMENT

I. THE GOVERNMENT PROPOSES TO OUST THE JURISDICTION OF THE SUPREME COURT TO REVIEW AND CORRECT VIOLATION OF CONSTITUTIONAL RIGHT SUFFERED BY THE MILITARY DURING COURTS MARTIAL, WHERE IMPRISONMENT IS NOT THE PUNISHMENT.

The Petition omits reference to the sweeping loss of jurisdiction of *this Court* posed by the Government's novel view of Article 76 of the Uniform Code of Military Justice. Since no certiorari jurisdiction to this Court was created for judgments of the Court of Military Appeals (when the UCMJ was enacted in 1950), the serviceman whose punishment after 1950 fortuitously takes the form of dismissal rather than imprisonment has only one proven avenue for protection by this Court of his constitutional rights – review by the Court of Claims. For over 80 years this system of providing limited review in the civil courts – extending only to correction of constitutional injury – had exerted its salutary effect on the administration of military justice.

But, now, 18 years after the passage of the Uniform Code, the Government *for the first time in this Court* contends that the accident of punishment determines whether an entire class of military defendants will get any constitutional review, direct or indirect. If he is incarcerated, the serviceman will have the remedy of habeas corpus. If he is not, if he is dishonored, cashiered and dismissed after a denial of due process, he is said to be deprived of all recourse to the civil courts to raise his constitutional complaint. The accident of punishment would deprive the constitutionally-injured military defendant of any hearing before an Article III[11] Court, if he

[11] The importance to the military defendant of constitutional review in an Article III Court cannot be overemphasized. The touchstones

(Footnote 11 continued on page 16)

is so unlucky as not to be jailed. Indeed the hapless serviceman can literally go nowhere with his constitutional grievance.

(Footnote 11 continued from page 15)

of an Article III Court are the guarantees of independence found in lifetime tenure and guaranteed salary. See *Glidden Co. v. Zdanok*, 370 U.S. 556 (1962) and *Evans v. Gore*, 253 U.S. 245 (1920). The Court of Military Appeals is not an Article III Court. Its judges, however able and independent they may be – and they have been remarkably so – are appointed for 15 years, and the safeguard of liftime tenure and insulation from executive and legislative vagaries is missing in the Court of Military Appeals. Conclusive review of Constitutional issues before the court cannot, either in a formal or practical sense, be equated with review by a truly independent Article III civil court, such as the Court of Claims. The entire notion of substituting conclusive CMA review for Court of Claims actions and *review in the Supreme Court* falls apart when the impact of the Government's notion of eliminating Constitutional review in the Supreme Court is considered squarely. For, as Professor Bishop has aptly phrased it:

> "Congress may have made the Court of Military Appeals the final arbiter of the meaning of the Uniform Code of Military Justice but the Supreme Court of the United States is the final arbiter of the meaning of the Constitution of the United States."

Bishop, *Civilian Justice and Military Justice, Collateral Review of Court Martial Convictions*, 61 Colum. L. Rev. 40, 58 (1961). See also the very moving plea of Judge Kilday to his fellow Judges of the CMA in *U.S. v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1947):

> "To summarize, I can but again reiterate my certainty that this Court is bound by the Supreme Court on questions of constitutional import; that our actions in this area are reviewable by civil tribunals; that any other view adopted by us raises the specter of possible harm to an accused with no lasting benefit to the Government; and that finality of litigation occurs only if we face every such issue squarely." 16 U.S.C.M.A. at 263.

Judge Kilday cites as instances of casual handling in the military courts, where constitutional review by civil courts has been necessary to

(Footnote 11 continued on page 17)

This sweeping destruction of the salutary role that *this* Court has played in supervising military justice could have flowed (if at all constitutionally permissable – See Arg. IIIB, *infra*) only from a revolution in the thinking of Congress and the Courts in the treatment of the military. Certainly it would require the clearest kind of statutory language and legislative history to justify the loss of a proven constitutional remedy to vast numbers of men in the armed services. Changes *did* take place in the thinking concerning military justice in the period immediately after World War II. But these changes brought about wider protection for the rights of servicemen, not the destruction of their constitutional remedies. (See Arg. III, *infra*) The history and purposes of the 1948 amendments to the Articles of War and the enactment in 1950 of the UCMJ point strongly to a result quite the opposite of that urged by the Government, in that both enactments aimed at protecting the rights of servicemen and in so doing the traditional jurisdiction of the Court of Claims, and this Court, remained undiminished.

II. LIMITED REVIEW TO DETERMINE IF THE MILITARY DEFENDANT'S CONSTITUTIONAL RIGHTS HAVE BEEN PROTECTED HAS BEEN EXERCISED BY THE COURT OF CLAIMS AND AFFIRMED BY THE SUPREME COURT FOR OVER 80 YEARS.

When the Court of Claims entertained review of constitutional error in *Augenblick*, it did no more and no less in review of the actions of courts martial than it has always done, virtually since its first creation by Congress (Act of Feb. 24,

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(Footnote 11 continued from page 16)

keep the CMA "on its toes" and protect the rights of military defendants, *Gallagher v. Quinn*, 363 F.2d 301 (D.C. Cir. 1966), *cert. denied* 385 U.S. 881 (1966), *Ashe v. McNamara*, 355 F.2d 277 (1st. Cir. 1965), *Shapiro v. United States*, 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), and *Shaw v. United States*, 357 F.2d 949 (Ct. Cl. 1966).

1855, c. 122, 10 Stat. 612), *always with the sanction of this Court.* Respondent believes that this case represents the very first time, in more than 80 years, that the United States has told this Court that the Court of Claims does not have jurisdiction to review constitutional error in military proceedings, from which money claims against the Government have arisen.

Indeed, for many years following the creation of the Court of Claims, that Court was in active review of its determinations in the military pay area. See *Blake v. United States*, 14 Ct. Cl. 462 (1878), 103 U.S. 227 (1880); *Keyes v. United States*, 15 Ct. Cl. 532 (1879), 109 U.S. 336 (1883); *Runkle v. United States*, 19 Ct. Cl. 396 (1884), 122 U.S. 543 (1887); *United States v. Page*, 25 Ct. Cl. 254 (1890), 137 U.S. 673 (1891); *Mullen v. United States*, 23 Ct. Cl. 34 (1888), 140 U.S. 240 (1891); *United States v. Fletcher*, 26 Ct. Cl. 541 (1891), rev'd 148 U.S. 84 (1893) and *United States v. Brown*, 41 Ct. Cl. 275 (1906), 206 U.S. 240 (1907).

During these 80 years, this Court has reaffirmed repeatedly that Court of Claims jurisdiction is to be exercised in the review of military proceedings for constitutional defects. For example, in *Runkle*, the Court of Claims found no constitutional defect, but this Court reversed and remanded, finding a denial of due process in the ambiguous Presidential authorization of petitioner's discharge. In *Brown*, this Court, per Holmes, J., affirmed the Court of Claims' finding that a prejudicial irregularity in the composition of petitioner's court martial panel had rendered its judgment void.

While this Court has not had cause to pass directly on Court of Claims cases arising from military proceedings after the enactment of Article 76 of the UCMJ, note should be taken of the unambiguous words of praise for the determination in *Shapiro v. United States, supra,* in this Court's holdings in *Glidden Co. v. Zdanok, supra,* 370 U.S. at 557, per Harlan, J. ("In none of these cases, nor in others, could it well be suggested that the Court of Claims had adjudged the issues, no matter how important to the Government, otherwise than dispassionately.") and of Mr. Justice Franfurter in his separate opinion

on rehearing in *Burns v. Wilson*, 346 U.S. at 847-8. (citing also *Sima v. United States*, 119 Ct. Cl. 405, 96 F. Supp. 932 (1951) and *Fly v. United States*, 20 Ct. Cl. 482, 100 F. Supp. 440 (1951)). See also *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982 (1964), cert. denied, 377 U.S. 977 (1964).

The Court of Claims' treatment in military reviews since the passage of the UCMJ differs in no respect from those that went before. In each case, the touchstone is the presence of constitutional error, and the Court has been the first to view such error "dispassionately" and decline to upset military convictions where none are to be found. See also cases cited at footnote 20 *infra*.

III. ONLY THE CLEAREST, MOST UNAMBIGUOUS STATUTORY LANGUAGE AND LEGISLATIVE HISTORY COULD ELIMINATE THIS TRADITIONAL SAFEGUARD OF THE CONSTITUTIONAL RIGHTS OF SERVICEMEN. NEITHER THE LANGUAGE OF ARTICLE OF WAR 50(h) AND ARTICLE 76 (OF THE UNIFORM CODE OF MILITARY JUSTICE) NOR THEIR LEGISLATIVE HISTORY SUPPORT THE GOVERNMENT'S PROPOSAL TO VOID THE LIMITED JURISDICTION OF THE COURT OF OF CLAIMS TO REVIEW FOR CONSTITUTIONAL ERROR.

A. Congress did not Bar the Court of Claims' Traditional Jurisdiction in this Area.

The finality provision of Article 76 of the UCMJ does not purport to bar review by the Court of Claims of the constitutional errors in *Augenblick*. The Court of Claims so found (App. A 4-6) on the basis of its examination of the legislative history of Article 76, but the Government denies this and contends that "this very legislative history reflects a clear purpose to confine collateral review to habeas corpus." (Pet. 15) Even in its narrowest reading, that legislative history does not support the view that Congress intended to exclude traditional Court of Claims powers of constitutional review; moreover, the full record

of extensive study and debate prior to the enactment of Article 76 and its predecessor, Article 50h of the 1948 Articles of War makes it manifest that the petitioner places exaggerated emphasis on a few words of quick characterization taken out of the context of the complete legislative history.[12]

That the petitioner grossly labors the Congressional intent is made clear from two exchanges on the Senate floor occurring in the closing hours of debate on the UCMJ. Senator Wayne Morse opposed the bill (H.R. 4080) in part because he wanted it to provide a direct - albeit limited - avenue of appeal from the military courts to this Court. In support of his view, he introduced verbatim into the record an article[13] by Mr. Arthur John Keefe (one of the Department of the Navy's key consulting experts on the recodification) and Mr. Morton Moskin.

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[12] The Government relies on the identical terse language of the Senate and House Reports on the Executive draft to the Uniform Code to each body of the Congress: "Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments." S. Rep. No. 486, 81st Cong., 1st Sess. 32 (1949); H.Rep. No. 491, 81st Cong., 1st Sess. 35 (1949). All of the preparatory studies and reports cited in this Argument III are available to the Court in the files of its library in excellent special compedia. *See Legislative History. Amendments to the Articles of War, 80th Congress* (two volumes) and *Legislative History, Uniform Code of Military Justice, 81st Congress* (three volumes).

[13] Keefe and Moskin, *Codified Military Injustice — An analysis of the Defects in the New Uniform Code of Military Justice*, 35 Cornell L.Q. 151 (Fall 1949) appearing in 96 Cong. Rec., Part 2, pp. 1434–1441 (1950) Senator Morse asked the clerk to mark a copy of the article "for identification purposes," and said that he "should offer it as one of my key exhibits in support of the premises I am defending and advancing here this afternoon." 96 Cong. Rec., *supra*, p. 1435, Feb. 3, 1950).

Their analysis included the following explicit comment on the effect of Article 76:

> "Article 76 restates the existing law as to finality of court-martial judgments. Following such review as the code provides, court-martial judgments 'shall be final and conclusive'.
>
> "Presumably they will still be open to collateral attack, either by petition to a Federal district court for a writ of habeas corpus or by a suit in the Court of Claims to recover such back pay as may have been withheld by way of punishment . . ." 96 Cong. Record, *supra,* p. 1439

Then the authors went on to state their views that these traditional forms of collateral attack perpetuated in the Uniform Code were inadequate, since to "carry such appeals to the top of the Federal hierarchy of courts is so slow and cumbersome a process as to be of little practical value. ."[14] (1439).

The traditional avenues of civil review that Senator Morse thus sought to shorten and straighten, Senator Pat McCarran

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[14]See also the 1947 analysis of "Review by Civil Courts" in the Report of the General Court-Martial Sentence Review Board of the Navy on *Court-Martial Procedures and Policies,* by Arthur John Keefe and Robert S. Pasley, commonly known as the "Keefe Report":

> 'Review of court-martial proceedings in the civil courts normally takes the form of collateral attack, usually by petition for habeas corpus, occasionally by suit in the Court of Claims for back pay. The petition for writ of habeas corpus may be made at any stage of the proceedings, or afterwards, if the accused is still in confinement. . . Suit in the Court of Claims can of course only be brought after the sentence has been approved and the pay in dispute has been withheld or denied. Both types of action are subject to appeal to the Circuit Courts of Appeal, and to the United States Supreme Court. All this causes confusion, delay and uncertainty. In many

(Footnote 14 continued on page 22)

sought to make more explicit. As Chairman of the Judiciary Committee he asked for clarification from Senator Estes Kefauver, the floor manager of the bill in the Senate on behalf of the Armed Services Committee —

> "MR. McCARRAN. What does the bill mean when it says 'binding on all departments, courts, agencies, and officers of the United States'? Does not that attempt to bind the courts?
>
> "MR. KEFAUVER. As I said, it is the same language as that which was in the Kem amendment in 1948 [i.e. Article 50h of the 1948 Articles of War, referring to their Senate sponsor]. It attempts to bind the courts on all matters except jurisdictional matters.
>
> "MR. McCARRAN. Why does it not say 'all matters except jurisdictional matters'?
>
> "MR. KEFAUVER. The Humphrey case [*Humphrey v. Smith*, 336 U.S. 695 (1949)], of course decided that the Congress, through its enactment, did not, and could not, under the ninth amendment to the constitution, intend to take away the jurisdiction of the Supreme Court or of other courts in habeas corpus matters. It was the decision in the Humphrey case that the courts still have jurisdiction, and that the law does not take away the jurisdiction of the courts in habeas corpus proceedings."

(Footnote 14 continued from page 21)

> cases, important questions are not fully decided by a court of last resort." Keefe Report, p. 248

The Keefe Report appears in Vol. 2 of this Court's library compendium of legislative history on the Uniform Code. Mr. Keefe was a consultant to the Morgan Committee (under Professor Edward Morgan) which drafted the code in the Office of the Secretary of Defense, and Mr. Pasley was a key staff member of that committee.

> "MR. McCARRAN. But the Congress, when it enacts a law, makes the law. The Supreme Court may reverse a decision the next day, or the next week. . ." (96 Cong. Record, *supra*, p. 1414, Feb. 3, 1950)

The authoritative Kefauver distinction is thus predicated on maintaining rather than enlarging the judicially-enforced perimeter of prerogatives for military courts, and all ambiguity in the legislative history becomes clear: The reiterated limiting reference to habeas corpus review was intended solely to skirt the shoals of a then-recent constitutional decision of this Court, *not* to break any new ground for Congressional powers, and certainly *not* to limit the existing powers of the civilian courts.

Senator Kefauver's reference to re-enactment of the Kem amendment[15] provides further dimension to the traditionalism implicit in the legislative history of Article 76, and makes the history and intent of the (substantially identically worded) predecessor section directly pertinent.

The 1948 revisions of the Articles of War were the first post-war revisions to the Army's military courts-martial system, and indeed, the first revision of the Army procedures since 1920 (Act of June 4, 1920, c. 227, Sec. 1 *et seq.*, 41 Stat. 787, *et seq.*). They were enacted to stem public criticism of slipshod, inequitable, and sometimes cruel treatment of military prisoners during World War II and to provide a basis for civilized treatment of discipline problems in a military establishment of unprecedented size. The background of their enactment indicates that the principal purposes of the 1948 revisions were to regularize and simplify existing procedures and to strengthen the likelihood

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[15] See also confirmations of the direct derivation of Article 76 from Article 50h in House Armed Services Committee, Subcommittee No. 1, *Hearings* on H.R. 2498, 81st Congress, 1st Session (1949), p. 1222; and Senate Armed Services Committee (Subcommittee), *Hearings* on S. 857 and H.R. 4080, 81st Congress, 1st Session (1949), p. 119.

that the machinery of courts-martial could operate with substantial fairness.[16]

Thus, in its Report, dated Dec. 13, 1946, wrote the Advisory Committee on Military Justice to the War Department (The Vanderbilt Committee),[17] whose recommendations formed the basis for the War Department's proposals enacted in the Elston-Kem Amendments:

"Specific Recommendations

"A. The Checking of Command Control

"5. The final review of all general court martial cases should be placed in the Department of the Judge Advocate General and every such review should be made by the Judge Advocate General or by the Assistant Judge Advocate. . . This recommendation relates not only to checking command control but also in particular to the correction of excessive and fantastic sentences and to the correction of disparity between sentences.

"In order to make this recommendation effective, Article of War 50 ½ [the predecessor of Article 50h] should be amended. It should be rewritten and procedure prescribed should be clearer and more definite." Vanderbilt Committee Report, pp. 8-9.

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[16] The Bill (H.R. 2575, 80th Congress, 1st Session) was itself entitled "A Bill to amend the Articles of War to improve the administration of military justice, to provide for more effective appellate review, to insure the equalization of sentences, and for other purposes," — and staked out no broader field for military courts than that.

[17] The report of the Vanderbilt Committee appears in this Court's *Legislative History, Amendments to the Articles of War, Supra*, vol. 2.

In his letter of transmittal to the House Committee on the Armed Services, Secretary of War Robert P. Patterson on March 12, 1947, wrote:

> "Section 26 . . . amends the present provisions of article 50 ½ to make explicit the finality of sentences of court martial." H.R. No. 1034, 80th Cong., 1st Sess. p. 12. (1947)

And Brigadier General Hubert D. Hoover, Assistant Judge Advocate General of the Army, testified that

> "The principle [of finality] is well established at present but the amendment is somewhat more definite than the present article." House Armed Services Committee, Subcommittee No. 11 (legal), 80th Cong., 1st Session (1947), *Hearings* on H.R. 2575 (1947), p. 1118.

Even as the scope of the 1948 amendment was thus to make *existing* provisions more explicit and more definite[18] — and again, not to break new ground in relation to civil jurisdiction — the direct purpose within the military establishment of the

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[18] It is clear from authoritative contemporaneous administrative interpretation of Article 50h of the Articles of War that the principal of finality therein made explicit had a narrow and limited interpretation. In 41 Op. A.G. 49, December 29, 1949, Attorney General J. Howard McGrath advised the Secretary of the Army that the terse finality provisions of Articles of War 50h, as amended by section 226 of the Selective Service Act of 1948, could *not* bar preexisting procedures for administrative clemency in the correction of military and naval records post court-martial pursuant to Section 207 of the Legislative Reorganization Act of 1946. (Then 5 U.S.C. 191a, 275; now 10 U.S.C. Sec. 1552). The Attorney General's opinion was based on the "cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) and the absence of any evidence "[that] indicates that Congress had any intention thus to supersede sections 131 and 207 of the Legislative Reorganization Act." 41 Op. A.G.

(Footnote 18 continued on page 26)

newly-honed "finality" provision was succinctly stated in the Report of Mr. Elston, the Chairman of Subcommittee No. 11, and the House sponsor of the bill —

> "The section [section 26] makes explicit the finality of sentences of court martial, and for the first time, authorizes reviewing authorities to weigh the evidence in addition to determining the law. Absence of this authority heretofore has been a common cause of criticism." Report by Mr. Elston to House Armed Services Committee, July 8, 1947, at page 4163 of House Armed Services Committee (full committee), 80th Cong., 1st Session, *Hearings* on H.R. 7741 and H.R. 2575.

The principle of finality, as thus expressed in both the 1948 amendments to the Articles of War and the Uniform Code of Military Justice, merely strengthened the mechanisms of review within the traditional ambit of jurisdiction of the military courts, and in no way displaced the traditional, pre-existing scope of the jurisdiction of the Court of Claims to pass on constitutional error.

(Footnote 18 continued from page 25)

at 53. As an authoritative administrative interpretation, the Attorney General's careful finding of a limited scope for "finality" must be given great weight. *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 at 315 (1933); *Edward's Lessee v. Darby*, 25 U.S. (12 Wheat.) 206 (1827). And where a statute (Article 50h) is reenacted, having received a contemporaneous and practical interpretation, such interpretation must be given even greater weight. *United States v. Anderson*, 269 U.S. 422, 439 (1926); *Brewster v. Gage*, 280 U.S. 327, 337 (1930). Attorney General McGrath's Opinion was found "noteworthy . . . that as a matter of administrative recognition this 'finality' provision has not been read with dictionary liberalness" in Mr. Justice Frankfurter's additional Opinion in *Burns v. Wilson*, *supra*, 346 U.S. at 850 fn 2.

B. Moreover, assuming, contrary to all legislative history, that Congress ever intended to eliminate recourse to the Court of Claims, a grave question of Congress' constitutional power to deprive the military of this remedy would thus be raised.

It is entirely clear from the rulings of this Court that an individual whose federal office has been taken from him by the Government in violation of pertinent regulations covering dismissal has standing before the District Courts to contest his discharge. *Vitarelli v. Seaton*, 259 U.S. 533 (1959), *Service v. Dulles*, 354 U.S. 363 (1957). In other cases this Court has held that the citizen's right to travel gives him standing to seek his day in Court if this right is invaded. *Kent v. Dulles*, 357 U.S. 116 (1958). Now the Government tells this Court that Congress (assuming it ever intended to destroy a well-ordered judicial mechanism of constitutional protection for the military) has the power to deny a defendant deprived of *constitutional* rights of his day in an Article III court. Yet this Court's clear holdings on the individual's right to sue in a civil court where agency procedures are questioned makes the constitutionally deprived serviceman's right to sue in civil courts an even stronger right. If Congress intended that the military victim of violations of due process be deprived of such remedy, the constitutionality of Article 76 of the UCMJ is put squarely at issue.

Respondent submits that such a claim raises the gravest form of constitutional question. But since this Court is wisely reluctant to resolve constitutional questions if Congressional intent fairly removes such issues from controversy, and because Congress' intent here so manifestly leaves unimpeded Commander Augenblick's limited access to civilian courts for constitutional redress, it is inappropriate to address this Constitutional argument in this Brief in Opposition. Should the Court grant Certiorari in *Augenblick*, however, Respondent specifically reserves this argument for briefing on its merits.

IV. BOTH CONGRESSIONAL ACTIONS AND JUDICIAL HOLDINGS SINCE THE PASSAGE OF ARTICLE OF WAR 50h AND ARTICLE 76 OF THE UNIFORM CODE OF MILITARY JUSTICE CONFIRM THAT THE JURISDICTION OF THE CIVIL COURTS TO CORRECT CONSTITUTIONAL ABUSE SUFFERED BY SERVICEMEN DURING COURTS MARTIAL WAS NOT REMOVED BY THOSE ENACTMENTS.

A. Legislative Action Bearing on the Jurisdiction of the Court of Claims After Passage of Article of War 50h in 1948 and Article 76 in 1950 Indicate No Dimunition in the Scope of the Court's Powers.

The basis for Court of Claims jurisdiction in *Augenblick*, 28 U.S.C. 1491, has experienced but one significant change in wording – wholly irrelevant here – in the 81 years since the Tucker Act originally gave jurisdiction to that Court in its current scope (Act of March 3, 1887, c. 359, 24 Stat. 505). Significantly, all of Section 1491, containing as it did theretofore "jurisdiction to render judgment upon any claim against the United States: (1) Founded on the Constitution", was re-enacted into law on June 25, 1948 – the day following the enactment that created Article of War 50h. If a major excision in the jurisdiction of the Court had been made just the day before and if such surgery had been within the contemplation of the Congress, strong indication would surely be found in the contemporaneous reports and debates surrounding the re-enactment of Section 1491 in P.L. 773 of the 80th Congress. Yet there is not a word in any such source[19] that

[19] See discussions of Section 1491 in House Committee on Revision of the Laws, *Revision of The Federal Judicial Code, with Revision Notes* (Preliminary Draft) (1945), Pp. 287-8; House Committee on Revision of the Laws, *Revision of Title 28, United States Code* (H.R. Rep. No. 2646), 79th Cong., 2 Sess. (1946), p. 133); and House Committee on Revision of the Laws: *Revision of Title 28, United States Code* (H.R. Rep. No. 308) 80th Congress, 1st Sess. (1947, p. A138). See also 96 Cong. Rec., 7927, 8540, especially remarks of Mr. Donnell at 7928.

even remotely suggests any awareness whatsoever on the part of Congress that a major revision of the jurisdiction of the Court of Claims was being undertaken.

Indeed, Congress knew well how to limit the jurisdiction of the Court of Claims with specific language. On the next and second occasion since June 24, 1948 (when Article of War 50h was enacted) when the scope of jurisdiction of the Court of Claims came before the Congress, P.L. 158 of the 83rd Congress in 1953 amended 28 U.S.C. 171 to remove all doubts that the Court of Claims was a constitutional, Article III Court, and simultaneously re-enacted Section 1491 with a specifically limiting amendment – to remove from the Court's jurisdiction claims against, or founded upon actions of the Tennessee Valley Authority. But in so doing the legislative intention was made very clear that *no other changes* were being made in the jurisdiction of the Court. (H.R. Rep. No. 695, 83rd Congress, 1st Sess., p. 6 (1953)). This action demonstrates that Congress intended that the Court of Claims' jurisdictional limits should be set with clarity in explicit language in the Court's own statutory jurisdictional section (Title 28), and not grossly altered by implication drawn from earlier passage of a provision only speculatively related to the Court's powers.

B. The Weight of Judicial Pronouncement Since 1948 Affirms the Power of Civilian Courts to Review Constitutional Error Occurring During Courts-Martial Resulting in Punishment Other Than Confinement.

1) Court of Claims Cases:

It is singular to read the Government's discovery in 1968 that Article 76 prevents constitutional review by the Court of Claims. To be sure, no military defendant alleging constitutional error had won a judgment from the Court of Claims in

the twenty years between enactment of 50h and the decision in *Augenblick*. That very fact is excellent commentary on the restraint with which the Court of Claims has exercised its limited jurisdiction in these matters. On at least six occasions between 1956 and 1964, however, the Court of Claims did precisely what the Government says it cannot do under Article 76 (ultimately finding for the Government); it reviewed the record of courts martial for constitutional error. In each case the Court of Claims scrutinized entire records of the military proceeding in order to determine whether the defendant's right to due process had been observed. In each instance the Court declared quite clearly that its jurisdiction extended to such review.[20] At no time during this period (which the Government must now view as an advanced state of judicial self-delusion) did either the Department of Justice or any of the military departments take what now must have appeared to them as wholesale aberrations before the Congress for rectification. On the contrary, it permitted the Court of Claims to engage time and again in what the Government could only have viewed as wasteful exercises. The bizarre nature of the Government's reticence in correcting judicial persistence in error is reflected in the last

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[20] In each of the following cases, the Court of Claims engaged in a full-scale examination of the military record to determine whether or not the Defendant's constitutional rights had been observed: *Krivoski v. United States* (denial of counsel), 136 Ct. Cl. 451, 145 F. Supp. 239, *cert denied*, 352 U.S. 954 (1956); *Graham v. United States* (admission into the court-martial of testimony taken at a Court of Inquiry), 136 Ct. Cl. 324 (1956) *cert. denied*, 353 U.S. 917 (1957); *Griffiths v. United States*, 145 Ct. Cl. 669, 172 F. Supp. 691; *cert. denied*, 361 U.S. 865 (1959); *Begalke v. United States* (improper search and seizure and denial of counsel), 148 Ct. Cl. 397, 286 F.2d 606, *cert. denied*, 354 U.S. 865 (1960); *Narum v. U.S.* (admission of Court of Inquiry testimony, denial of a closed hearing) 151 Ct. Cl. 312, 287 F.2d 897 (1960) *cert. denied* 368 U.S. 848 (1951); *Hooper v. United States*, 164 Ct. Cl. 151, 326 F.2d 982 (1964) *cert. denied*, 377 U.S. 977 (1964). In each case, after full scrutiny of the record, the Court determined — on the merits of the constitutional complaint, that no constitutional deprivation had occurred during the court-martial.

of these Court of Claims holdings, *Hooper v. United States,* 164 Ct. Cl. 151, 326 F.2d 982 (1964), *cert. denied* 377 U.S. 977 (1964). There the Court examined the bars of collateral estoppel and res judicata imposed by the Government against Court of Claims consideration of a Court-Martial judgment affirmed by the Court of Military Appeals. It held that overriding considerations prevented either doctrine from being applied to convictions of military defendants who are not confined:

> "We believe that an example of such an overriding consideration is present here, since a party should be given his day in a Court from which review by the Supreme Court might ultimately be afforded. This was not present in the instant case because of the finality given to the decision of the Court of Military Appeals" (164 Ct. of Cl. at 156)

Thus it noted that Article 76 precluded direct review by the Supreme Court of decisions of the Court of Military Appeals, and that habeas corpus was not available to the Defendant involved because he was not confined. The Court concluded:

> "The Plaintiff's only remedy was to bring a suit in this Court for retired pay withheld alleging the unconstitutional exercise of jurisdiction over him." (ibid, 156)

This is a constitutional Court interpreting its own jurisdiction not once but six times within eight years. Such a Court's view of its own jurisdiction should carry great weight before the Supreme Court. This weight simply corroborates the legislative history refuting the Government's present contentions.[21]

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[21] The Government has kept its secret as to meaning of Article 76 well concealed from scholars as well as the Congress. In a 1966 symposium devoted to all aspects of the Court of Claims, making up an entire volume of the Georgetown Law Journal (*A Symposium – Part I: The United States Court of Claims,* 55 Geo. L. J., December, 1966), there is not one word of recognition, or even reference, to any limitation on the Court's powers resulting from the enactment of Article 76 or Article of War 50h.

2) Holdings of Courts of Appeal and of the Supreme Court.

Save for one case whose authority is wholly vitiated by its own facts,[22] no federal court appears to share the Government's present view of Article 76. In the most recent case in which these provisions were raised, the Court of Appeals for the District of Columbia (Judge Fahy writing) – over objections from the Government that habeas corpus was the military defendant's sole civil remedy – held that the District Court possessed jurisdiction to review a constitutional issue raised by a Defendant not in confinement. *Gallagher v. Quinn, supra.* The Court's language succinctly phrased the dilemna otherwise facing the Defendant not under confinement:

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22 The Government raises a spurious claim that *Dickenson v. Davis* (C.A. 10th), 245 F.2d 317 (1957), *cert. denied*, 355 U.S. 918 (1958) is "squarely in conflict with *Augenblick.*" (Petition, p. 20, 1n. 12) In that Tenth Circuit case the Court found no violation of Dickenson's constitutional rights to due process. The reason it so held is quickly discovered from the Government's own Brief in Opposition to Certiorari in this Court (*Dickenson v. Davis*, Misc. 253, October Term, 1957). In *Dickenson*, one Carrick was used a prosecution witness. He had made a pre-trial, shipboard statement concerning Dickenson, which at first was not offered to the Defense. Carrick then made another, second, pre-trial statement concerning Dickenson. We quote from the Government's Brief to this Court, at p. 10:

> "'It' [the second statement] was furnished to and used by defense counsel, who expressly disclaimed any interest in the shipboard statement at that time" . . . [citing references to the trial record] "Later, defense counsel did request the shipboard statement" . . . [citing references to the trial record] "and the prosecution attempted to get it for him." [citing references] *Before the end of trial, defense counsel expressly withdrew his request for the pre-trial statement* . . . [citing references]" (emphasis supplied)

Contrast this waiver with the persistent, unsuccessful attempts of Commander Augenblick's counsel to gain access to the tape of Hodges' interview, as well as Mendelson's notes, and the distinction is clear.

> "The Supreme Court is the final arbiter of due process under the Constitution. The Supreme Court has not been granted jurisdiction to review either on direct appeal or certiorari a decision of the Court of Military Appeals. The consequence is that unless jurisdiction lies in the District Court in such a case as this, with appellate jurisdiction in this Court and then in the Supreme Court, the constitutional validity of the Act of Congress cannot be decided except by the military tribunal. The 'separate and apart' military law jurisprudence, referred to in those terms in *Burns v. Wilson*, . . . would appear not to be separated so far from possible Supreme Court scrutiny." 363 F.2d at 304.

The Court further viewed the Supreme Court's holding in *Gusik v. Schilder*, 340 U.S. 128 (1950) as holding that:

> "the decision of a Court Martial is open to collateral attack, other than by a habeas corpus proceeding." 363 F.2d at 303, fn. 3.

Indeed, far from speaking language of limitation, this Court in *Gusik* (as pointed out by Judge Davis in his opinion, App. A. 5) has enumerated a series of civil actions *other* than habeas corpus which have been traditionally available to the military defendant (citing 340 U.S. 128, at 133, fn. 3).

It is difficult to assess exactly what *Burns v. Wilson*, 346 U.S. 137 (1953) added to the rules governing civilian review of courts martial, because the Court's holding was diffused by the plethora of opinions issued by a divided Court. It is, however, well within the majority holding of the case to permit review in the civilian courts such as has occurred in *Augenblick*. The Government contends that consideration (by the Court of Claims) of the constitutional claims in *Augenblick*

> "would involve the re-evaluation of evidence already considered by the military." (Pet., p. 18).

which, the Government contends is foreclosed under the majority opinion in *Burns*. But, of course, there has been no "re-evaluation of evidence" by the Court of Claims in *Augenblick*. In *Augenblick* there was no airing of any dispute of fact and no re-sifting of the evidence required in order for the Court of Claims to determine that the Board of Review and the Court of Military Appeals had erroneously placed the burden on the *defendant* of demonstrating the Government's bad faith when not complying with the Jencks mandates. Nor was any review of evidence required in order to find error in the refusal of the Law Officer (and his affirmance by both military appellate tribunals) to conduct an *in camera* examination of the Mendelson interview notes when the Jencks Act makes such an examination mandatory. These are rules of *law* as to which no review of the evidence was either required or undertaken. Furthermore, when the Court of Claims acted in *Augenblick* it did so entirely in line with the majority's admonitions in *Burns v. Wilson, supra* –

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers – as well as civilians – from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts." 346 U.S. at 142-3

The Court of Claims in *Augenblick* went no farther than that to inquire if constitutional error had occurred in the military proceeding.[23] Obviously the scope of such review is much nar-

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[23] In his Opinion on Rehearing Justice Frankfurther goes on to find "the legislative history of the Uniform Code of Military Justice strongly suggests that it was precisely in the realm of collateral judicial attack on Courts-Martial that the concept of "finality" was intended not to operate" citing *Gusik v. Schilder, supra*, a holding whose terms specifically enumerate modes of civilian review available for the unconfined military defendant). *Burns v. Wilson, supra*, 346 U.S. at 850.

rower than ordinary appellate review (contrast Petition, p. 18) as the restrictions set by Judge Davis for his inquiry into what happened at Commander Augenblick's court martial make tellingly clear (App. A. 8-9).

V. THE COURT OF CLAIMS EXERCISED ITS TRADITIONAL RESTRAINT IN LIMITING ITS HOLDING TO THE FACTS OF AUGENBLICK. WITHIN THESE LIMITS, THE HOLDING OF THE COURT OF CLAIMS FALLS SQUARELY WITHIN THE SUPREME COURT'S DEFINITION OF CONDUCT VIOLATIVE OF CONSTITUTIONAL DUE PROCESS AND, HENCE, WITHIN THE TRADITIONAL JURISDICTION OF THE COURT OF CLAIMS.

A) The unanimous holding of the Court of Claims, per Judge Davis, thoroughly reflected the Court's awareness of its limited jurisdiction in military matters. Not only did the Court refuse to weigh the evidence bearing on guilt or innocence, but it restricted its inquiry into allegations of procedural defects which Commander Augenblick alleged placed him in double jeopardy and denied him due process.[24] The Court further circumscribed its inquiry into contentions that due process had been violated (by the Jencks Act violations) by declaring:

> "Every violation of the protections afforded by the Jencks Act does not, in and of itself, amount ipso facto to a violation of the Due Process Clause." (App. A. 32)

No general rule equating Jencks Act violations with invasions of constitutional due process can, accordingly, be drawn from the holding of the Court of Claims. The Court looked solely to the factual circumstances before it:

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[24] The Court ruled against Commander Augenblick on the double jeopardy claim (App. A. 9-15). It is not raised before this Court.

> "But we must explore the special circumstances of the case to determine if the statutory violations so fatally infected the Court Martial proceedings against Plaintiff that he was unconstitutionally deprived of a fair trial." (App. A. 32)

That Court held that these circumstances rose to the level of Constitutional deprivation of due process.

In so doing the Court of Claims was acting within the Supreme Court's clear definitions of conduct violative of due process. The following elements of Commander Augenblick's treatment during the naval proceedings cry out for correction within rules set by Supreme Court holdings on due process:

> (1) The burden of proving bad faith when the Government did not comply with the Jencks Act requirements of production was placed on the *Defendant* by the Naval Board of Review, and was affirmed without review by the Court of Military Appeals. The result of this rule was simply to read out of the law of courts martial any requirement of production where a particular prosecutor would prefer to ignore the requirement. How is the military defendant ever to pierce the overwhelming veil of official secrecy if *he* must prove the *Government's* bad faith in not complying with a discovery requirement incumbent upon it? The Government now *agrees* that the Board of Review and the Court of Military Appeals thereby engrafted a wholly erroneous rule of law onto proper application of the Jencks Act to military proceedings. (Pet., p. 19, citing *Campbell v. United States*, 365 U.S. 85 (1961)).
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> (2) Neither the court martial itself, nor its Law Officer were ever permitted to hear Agent Mendelson and to then judge for themselves whether the accumulation of his allergies to candor indicated that a more basic irregularity was present in the presentation of the Hodges' testimony. Again the Jencks

Act was clearly violated. (See cases cited by Judge Davis, in his opinion, App. A. 27).

(3) The Law Officer never even looked at Mendelson's notes of the Hodges interview before he denied their production to the Defendant. The requirement of an *in camera* examination of such documents is mandatory under the Jencks Act (18 U.S.C. 3500(c)). Indeed the veil of secrecy dropped securely over the initial interview between Hodges and the Navy Intelligence investigators was preserved intact throughout the entire Navy proceeding.[25]

In each of the foregoing respects the Jencks Act was violated during the military proceedings. It is vital that not only did these errors occur during the Court Martial but these same errors were sanctified and elevated into rules of law governing application of the Jencks Act to *future* military prosecutions by the decision of the Navy Board of Review and summary refusal to review that decision entered (without opinion) by the Court of Military Appeals. No simple aberration of a single Law Officer is involved here. The entire future administration of the Jencks Act is implicated in the errors of law pronounced by the appellate military tribunals.

And it must never be forgotten that Hodges did, in fact, receive a promise of an honorable discharge, and did, in fact,

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[25] Indeed, the failure of the Law Officer to compel delivery of Mendelson's notes for an *in camera* examination encompassed a further Jencks Act violation pursuant to 18 U.S.C. 3500(c), whereunder any portion of a Statement withheld from the defendant

> "shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge."

A peculiar vice of the refusal to permit an *in camera* examination here was to stifle the availability of any appellate review whatsoever of Mendelson's notes.

have this promise kept in abeyance until he testified against Commander Augenblick. Examination of the totality of these errors and their surrounding circumstances in the *Augenblick* case moved the Court of Claims unanimously to hold that due process had been denied Commander Augenblick. This conduct, viewed against the admitted violations of the Jencks Act, is redolent of unfairness and the opportunity for contrivance which has offended the Supreme Court's conscience in a clear series of recent holdings. In *Brady v. Maryland*, 373 U.S. 83 (1963), the prosecution withheld from the defense a confession of homicide by another defendant who was tried separately. This Court held that suppression of evidence favorable to the accused violated due process irrespective of good or bad faith of the prosecution. In *Napue v. Illinois*, 360 U.S. 264 (1959), in circumstances very similar to Augenblick, the prosecution withheld from the Defense the fact that the accomplice had been promised special consideration in return for his testimony. The Court reversed, finding a violation of due process. In *Mooney v. Holohan*, 294 U.S. 103 (1935) the allegation was made that the State had used knowingly perjured testimony, and this Court reversed and remanded for hearings on these allegations. See also *Pyle v. Kansas*, 317 U.S. 213 (1942), *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Barbee v. Warden of Maryland Penitentiary*, 331 F.2d 842 (4th Cir. 1964), with Judge Sobeloff reversing a conviction where the State had withheld from the Defense tests indicating that the Defendant's gun, offered at trial, had not been used in the homicide.

In the *Augenblick* case this Court is faced with a corollary situation that inevitably flows from the rulings cited above, rulings dealing with suppression and non-disclosure by the prosecution. Can due process (as this Court has repeatedly held) guarantee the Defendant the right to use evidence which may be favorable to him if his power to discover its existence (itself guaranteed by statute) is not similarly guaranteed? All of the suppression and impropriety found in the convictions reversed by the Court would stand unchallenged if the Defendant's right to inquire into the existence of this evidence (if he happened not to be aware of it) were not accorded some pro-

tection. This is not to say that in every case this right to inquire holds the same constitutional protection as the right to use of the evidence itself. But where a heinous sex aberration is charged against a naval officer, and every conceivable step is taken to shield the accusing witness from inquiry into what happened in investigative interviews directly following the alleged offense, and the trial is redolent of an arrangement for testimony, then the denial of opportunity for inquiry rises to the same level of unfairness as suppression of evidence itself. Due process, in those circumstances, is surely violated.

Some word must be added to describe the Government's present position concerning the Jencks Act violations. Reminiscent of the Doctor's diagnosis that his patient was only a little bit pregnant, the Government states that these Jencks violations were "at most marginal" (App. A. 14). Immediately thereupon the Government agrees:

> "that the Government, rather than the defense, has the burden of producing whatever government witnesses might be helpful with respect to the circumstances surrounding a pretrial statement." (App. A. 19)

If for no other reason, the Court of Claims judgment should be sustained for eliminating the wholly destructive determination of the Board of Review (affirmed without opinion by the Court of Military Appeals) that the burden for ferreting out evasion of Jencks requirements should fall on the *defendant* rather than on the Government, which, manifestly, is the Party not complying with the Act. But the Government goes further and contends that:

> "all the government witnesses who might have knowledge of the matter have given testimony and denied knowledge of the whereabouts of the tape, as happened here, it was hardly unconstitutional or indeed, a violation of the Jencks Act for the Board of Review to entertain some doubt that the tape was ever made and thus refuse to conclude that there had been culpable destruction." (App. A. 19).

This contention leads this Court off on the following false paths:

> (1) All the government witnesses testified before the Law Officer at trial (where these Jencks Act determinations are required by law to be made) save *one*, Mendelson, the man who last possessed the tape that he had first claimed never existed and then claimed he never received. Neither the law officer charged with making the Jencks determination, nor the Court charged with determining whether Hodges' testimony had been compromised ever had one look at, or heard one word of testimony from Mendelson.
>
> (2) The Board of Review never "entertained doubts" that the tape was ever made. What it did do was to say that the tape could not be found and that the *Defendant* had not sustained his burden of showing why it was missing (App. B. 62-3).

In sum, neither the Government's abbreviated disclosure of facts to this Court nor its false trails can launder the Navy's conduct of Commander Augenblick's Court Martial. If the aroma of an arrangement for testimony pervades his trial, nothing that happened within the military appellate courts has in any way dispelled this taint. It is a bad example of military justice.

Absent review by the Court of Claims, the Navy could and presumably would persist in its uninhibited observance of the Jencks Act in its own very special way. The limited supervision of the civilian courts has rarely appeared to be more salutary, or more necessary.

VI. THE AUGENBLICK DECISION IN THE COURT OF CLAIMS STANDS SQUARELY WITHIN THE TRADITIONAL AND LIMITED JURISDICTION OF THE COURT OF CLAIMS – JURISDICTION THAT HAS BEEN WELL DEFINED AND CLEARLY LIMITED FOR 80 YEARS. CONSEQUENTLY, THERE IS NO NEED FOR THIS COURT TO INQUIRE INTO, REVIEW OR ARTICULATE RULES CONCERNING THE EXERCISE OF THIS PROVEN AND SALUTARY JURISDICTION.

A very simple rationable stands behind the Court of Claims jurisdiction over the *Augenblick* case. As stated throughout, it is the jurisdiction of the Court of Claims to review a military court martial to determine if the Defendant's constitutional rights have been violated, a traditional jurisdiction the Court of Claims exercised over the past 80 years with the early and long-standing approval of the Supreme Court. The sole question before the Supreme Court as a result of the Government's Petition in the *Augenblick* case is whether this traditional jurisdiction has been eliminated by Article of War 50h and Article 76 of the UCMJ. We believe it to be the manifestly clear intent of Congress that no such surgery was performed on the Court of Claims jurisdiction either in 1948 or in 1950, and there therefore remains no question properly before this Court as to the limits of the continuing Court of Claims jurisdiction in these matters. This jurisdiction extends solely to inquiry into whether the military Defendant received constitutional due process during his Court Martial. It is as clear and simple as that. No review by this Court of that jurisdiction, and no further articulation of its limits are required.[26]

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[26] The Government has raised the false specter of a flood of litigation (Petition, p. 27) if this Court determines that servicemen retain their access to the Court of Claims to plead constitutional grievances, and also cites six-year statute of limitations of the Tucker Act (28 U.S.C. 2501) as evidence of the havoc in reopening old cases that perpetuating this remedy for servicemen would work. The restraint of the Court of Claims (where military defendants have secured judgments in Court-

If this Court is satisfied that the unanimous holding of the Court of Claims is correct in finding that the constitutional rights of Commander Augenblick were invaded in his trial by the Navy and that Article 76 does not eliminate recourse to the civilian courts, this Court would simply be reaffirming clear law by denying Certiorari in the *Augenblick* case. By this action the Court would leave untouched law that has been clear for 80 years. On the other hand, further review and inquiry by this court into the jurisdiction of the Court of Claims would be not only needless and wasteful but could becloud a constitutional remedy that is both clearly etched and wholly salutary.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

/s/ Joseph H. Sharlitt
/s/ Steven R. Rivkin

Counsel for Respondent,
Richard G. Augenblick

Of Counsel:
FISHER, SHARLITT & GELBAND

April 16, 1968

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26 Cont'd.

Martial cases but thrice in the 18 years since the Uniform Code of Military Justice was enacted) is clearly evident in these matters. No flood of filings has occurred, further, as a result of the *Augenblick* decision. As to the six-year statute of limitations, it should be noted that no period of limitations whatsoever exists in habeas corpus proceedings. Review of stale records (often more than 6 years old) has never inhibited the effectiveness of this constitutional remedy.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief in Opposition to Certiorari of the Respondent, Richard G. Augenblick, have been served in hand this 16th day of April 1968 upon the Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. and Edgar H. Twine, Attorney, Civil Division, U. S. Department of Justice, Washington, D.C., attorney of record for the United States in the Court of Claims herein.

Steven R. Rivkin